TITLE TO LAND UNDER NAVIGABLE WATERS IN NEW YORK[1]

The purpose of this article is to analyze, not criticize, the views of the courts of this state on title to land under navigable waters. Any criticism of the decisions will come from the courts themselves. Undoubtedly there are apparent conflicts in the decisions; and, as was said by one of the judges of the Court of Appeals, they are "contradictory and unsatisfactory." [1] But in a later instance, one of the judges of the same Court took a more charitable and, at the same time, a more comprehensive view of the situation, in discussing the decisions on another point, that is, the power of the legislature either directly or through the commissioners of the land office, to make grants of such lands. He said:

"It would, no doubt, be difficult to reconcile all the numerous expressions of opinion to be found in the decisions on this question. In many of them general language is used which would seem to sanction the doctrine of absolute ownership and the unrestrained power of disposition by the sovereign, but this language must be read and understood with reference to the special facts of each case, and when thus read and interpreted, much of the apparent conflict disappears." [2]

And yet, it was the same court which, in 1883 by Earl, *J.*, said: [3]

"The legislature of this State, *except as restrained by constitutional inhibitions,* could authorize a boom to be placed for private use across the Hudson River, or grant its exclusive use to individuals, and it could grant in fee any of the inland navigable lakes wholly within this State, and its grants, thus made, would be irrevocable."

Possibly the learned justice writing that opinion was of that school which, once upon a time, supposed that the power and jurisdiction over navigable rivers wholly within the limits of a state, was supreme and unrestrained save by the legislative will or caprice; but this view, if it ever had the shadow of precedent to sustain it, has long since been set aside.

The navigable waters of a state are owned by the whole people of the nation. The right to freely navigate them belongs to all the people. It is a natural and primary right not granted by any law or derived from constitutional authority and is inalienable. Neither the state nor the federal government can do anything to destroy this right. This has been so frequently asserted by our own courts as not to be a matter even of controversy; and the same doctrine has been frequently de-

---

[1] Copyright, 1921, by Joseph B. Thompson.

[1a] Davis, *J.*, in *People, ex rel. Loomis* v. *Canal Appraisers* (1865) 33 N. Y. 461, 499.

[2] O'Brien, *J.*, in *Coxe* v. *State* (1895) 144 N. Y. 396, 406, 39 N. E. 400.

[3] *Langdon* v. *The Mayor* (1883) 93 N. Y. 129, 156.

clared by the Supreme Court of the United States. One of the more recent cases illustrating that doctrine is the case of *United States* v. *Rio Grande Irrigation Company.*[4] That was a case where it appeared that, with the express sanction of an act of Congress, the defendant had been for some time taking water from the upper reaches of the Rio Grande River, where it was not navigable, for purposes of irrigation. It developed that so much water was used that it seriously interfered with the use of the river for purposes of navigation, lower down, where it has always been navigable. Notwithstanding the legislative sanction under which the company was acting, the court held that such use was prohibited by the right, existing in favor of the nation as a whole, to have the use of the river for purposes of navigation forever conserved and protected. The court said:

"On the other hand, if the State of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters, which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the National Government would arise and its power to restrain such an appropriation is unquestioned."

The judicial history of this state shows at an early stage, the fate of an attempt by the legislature to give to a steamboat company monopolistic and exclusive rights in the Hudson. It was declared that this could not be done; and yet, that is precisely what the opinion of the court in the *Langdon* case, says can be done. There would be little reason to speculate on the fate of an act of the legislature which should grant the exclusive right to build and maintain a boom across the Hudson above Yonkers, and thus close that great highway of commerce to all navigation. The same court which decided the *Langdon* case would doubtless be in haste to declare such an act void. And yet, neither the federal nor state constitution contains any express prohibition against such an act. It is nevertheless prohibited.

The Court of Appeals, speaking by Judge Vann, in *Sage* v. *The Mayor,*[5] held that all grants of lands under navigable waters contain, by implication, whether so stated therein or not, a condition that they are subject to the permanent right to promote commerce and navigation. That there should ever have been any doubt as to this latter proposition is surprising. It may be said of the expression quoted from the *Langdon* case that what was there said was purely *obiter,* the only question in that case being as to the right of a grantee from the city of New York which held the submerged lands under the Dongan and Montgomerie charters, confirmed by the constitution and statutes, to access over the navigable waters adjacent to lands granted to him.

Many decisions of our courts have been made bearing on the ques-

[4] (1899) 174 U. S. 690, 709, 19 Sup. Ct. 770.
[5] (1897) 154 N. Y. 61, 79-80, 47 N. E. 1096.

tion of riparian rights in and over navigable waters; some of them indicate a degree of research and industry almost marvellous in its range. And yet in spite of all this, and in spite of the admittedly high character and great learning and ability of the courts considering the questions, courts which stand on a par, at least, with the highest court in the nation, the subject, as a whole, is in its infancy; and with the great and constant development of the commercial resources of the state and nation which is going on, new situations arise requiring the application of old principles in new and constantly varying ways. The state of the law on this subject bears the same relation to what will be its final adjustment as the commercial development of the port of London in the time of the Stuarts bears to its present state.

The constitution of New York of 1777, provided that

"such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of said colony on the 19th day of April, in the year of our Lord One Thousand Seven Hundred and Seventy-five, shall be and continue the law of this State, subject to such alterations and provisions as the legislature of the State shall, from time to time, make concerning the same."

This provision with certain verbal changes, was incorporated in later constitutions.

There was nothing in the statutory law of "England and Great Britain" or in the legislative acts of the colony controlling the question. Therefore, we shall need to deal only with the common law on this point as it existed as the time mentioned.

The power to change the rule is by this provision of the constitution vested solely in the legislature; and this the courts have recognized. Judge Woodward, in his concurring opinion, in *Gibson* v. *Casein Mfg. Co.*,[6] after referring to this provision said:

"And this, I take it, precludes the right of the courts to alter the common law." [7]

The prohibition of the power of the courts in this regard being, as it is,

[6] (1913) 157 App. Div. 46, 49, 141 N. Y. Supp. 887.

[7] See also the case of *Waters* v. *Gerard* (1907) 189 N. Y. 302, 82 N. E. 143, in which the same limitation on the power of the courts was recognized, in passing on the question as to the rule of the common law at the date mentioned bearing on the right of inn-keepers to a lien on goods of third parties brought to the inn by a guest: "In no one of the cases reported since 1775 either in this state or England where an alleged lien by an innkeeper against the goods of a third person has been sustained, has it been suggested that the court was thereby extending the common law rule as it existed in England prior to 1775. In each case the lien is sustained upon the common law as it existed at the time the decision was made which rule could not then have existed except by reason of a custom which had continued for such a period of time that the memory of man runneth not to the contrary. The statutory rule adopted by this state in 1897 does not, in our judgment, extend the rule so far as it relates to the property of third persons in the lawful possession of a guest beyond the rule of the common law as it existed prior to 1775."

absolute, will apply equally to that tendency sometimes unfortunately indulged in, to legislate judicially. So if in any case it be found that the courts either erroneously or by design have attempted to declare a rule to have been a principle of the common law existing at the time stated in the constitutional provision, when in fact such principle or so-called principle did not exist, then we must reject the decision as unsound and not binding. It is in direct conflict with the constitution.

The question resolves itself thus into an inquiry as to what was the common law of England, on the 19th of April, 1775, on the subject under consideration. This may be examined in its relation to then existing conditions in the colony of New York in four ways: the rule as applicable to waters navigable in fact affected by the ebb and flow of the tide; the rule as applicable to fresh water streams not affected by the tide but navigable in fact; the rule as applicable to fresh water lakes also navigable in fact; and the rule as applicable to tidal waters not in fact navigable.

The general notion is that the title to all lands under the navigable tidal waters of the state passed at the time of the Revolution from the English Crown to the people of the state as the successor of the Crown, and the first declaration of the New York legislature on the subject, undertook to include lands under the waters of navigable rivers by giving the commissioners of the land office the power to make grants thereof to proprietors of the adjacent uplands for the promotion of commerce of the state; grants to persons other than such proprietors to be void. Manifestly the assumption by the legislature of the proposition that title to such lands was vested in the people was without warrant if on or before the 19th day of April, 1775, by fixed principles of the common law, the title thereto had not then been vested in the English Crown; for a mere legislative declaration, not sustained by the fact, would be nugatory. Subsequent legislation has extended the ostensible power of the commissioners of the land office so as to include, with some possible exceptions, all lands under all the waters of the state navigable in fact, regardless of the ebb and flow of the tide. Moreover, commissioners have been in the habit of treating such lands as belonging to the state, in fee, and of disposing of them, for a sound price to the adjacent riparian owner. The power to make grants for purposes other than the promotion of commerce, that is, for beneficial enjoyment of the upland owner and for agriculture, was given by the act of 1850.

The courts have declared more than once that by the common law of England the title to these lands had been vested in the English Crown, and had passed to the people at the time of the Revolution. These declarations, however, were based on the dictum of Lord Hale, in his *De Jure Maris,* and not on any decision of the English courts. The

question then is, on what authority did the declaration of Lord Hale rest; for if not sustained by *decisions* well recognized and followed, it manifestly is not entitled to be regarded as the law. The reverence which our courts, especially in earlier times, had for Lord Hale was perhaps natural enough. In those days our judges did not have access, generally at least, to the English reports and were not, therefore, in a position to verify the statement of a text-writer. Lord Hale had a great reputation, and that reputation happily still survives, but he might still have erred in some instances. That he did err in more than one respect is shown by the learned author of Gould on *Waters*; and we do not now accept the view of William Wirt, that

"With a mind beaming the effulgence of noonday, he sat on the bench like a descending god!" [8]

At the present time, it is well understood that the only authority which Lord Hale had for the statement was the case of *Attorney General* v. *Philpott*.[9] That being so, it will be interesting to see if the decision in that case justified the statement referred to. That it did not is obvious to any careful student of the times of the Stuarts.

There is another case, that of the Prior Tynemouth [10] occurring in the time of Edward I, about 1292, also referred to by Lord Hale; but it is reasonably clear from what we know of that case, that the information proceeded on the right of the King as affecting the port, that is, the right to control the waters and the lands thereunder for purposes of commerce and navigation. The jury found that the title to the land (between high and low water mark, which was as far as the issue went on that point) rested with the Prior. Impliedly, at least, its finding was adverse to any contention which the Crown might have made of title, as proprietor, as distinguished from the right to control commerce and navigation in public waters where the tide ebbed and flowed. Lord Hale [11] does not cite this case as sustaining the contention of title in the Crown to such lands, for he says that "judgment was given against the Prior, but not in express terms for the soil, but implicitly"; and in draft of his treatise, he says that "I do not remember that any judgment as to that particular is given against the Prior," that is, regarding title to the soil under water. In fact, it appears that it was unnecessary in that case for the court to so decide; and the Crown in that day, unlike in the time of the Stuarts, was not seeking to enhance the private purse of the sovereign by reaching forth for revenue from such sources.

Before considering the *Philpott* case, it will be of interest to note that prior to the time of Queen Elizabeth, the decisions contain nothing

[8] Note to *Ex parte Jennings* (N. Y. 1826) 6 Cowen 536.
[9] 4 Kay & J. 295 n.
[10] (1292) Coram Rege, 20 Edw. 1, roll. 58.
[11] (1667) *De Jure Maris*, c. 4, reprinted in Moore, *History of the Foreshore* (3d ed. 1888).

tending to show that the Crown claimed, by prerogative, title to such lands. It was during her reign that the pamphlet of Thomas Digges appeared, evidently inspired by royal will and written for court favors promised or anticipated, for there is no pretense by the writer that his position is based on decided cases. In fact, as the records show,[12] Mr. Digges was defeated in his contention in every instance reported, and the fee in the soil was held to be in the lord of the manor in each case when that question was decided. The first reported proceeding by Digges [13] was based on a grant from the Queen to him for lands below high water mark at Heythe, he having sued the lord of the manor therefor. The latter resisted and the case was dismissed, after a plea had been interposed by the defendants. During the reign of James I, that ruler frequently undertook to assert his prerogative right, but always without success, and it remained for his successor, the unfortunate Charles I, again to bring the issue forward in the hope of replenishing the always needy privy purse. Thus the matter once more came to the attention of the court. A case was brought in 1628, by the attorney general against one Riggs, in which, so far as we are able to discover, judgment went for the defendants; at any rate, it was not favorable to the Crown. In 1631, the case of *Atty. Gen'l ex rel. Wandesford* v. *Stephens*,[14] arose and was decided against the Crown.

We come now to what later became known as the *Philpott* case. This first arose in 1628, on an information filed by the attorney general on the relation of the Earl of Carlisle against Brampton and one Stepkin for part of the Hermitage Wharf at Wapping. This case is interesting, not for the result, for it appears to have been dropped before judgment, but for the sidelight which it throws on the way in which the later (*Philpott*) case was managed. The Earl of Carlisle's agents, writing to him in November 20, 1628, after stating that in this matter they find strong opposition, say that they hope it will

"go very successively on, and the rather when some of the Barrons have receaved directions from the Kinge to take it into their better care by way of furtherance, which his Majestie by good meanes will be forthwith solicited to doe." [15]

Evidently Charles was trying out his power on his judges; a power in the exercise of which he seemed to be more successful at a later stage, after his courts had been reorganized to suit his purposes.

The King had granted to the Earl of Carlisle certain lands, constituting a part of the foreshore at Wapping. It was found that certain

[12] Notably *Sir John Constable's Case*, Anderson p. 86, and *Sir Henry Constable's Case* (1601) 5 Co. Rep. 106a, although there are others.

[13] *Ex Q. R. Memda.* (1572) M., 14 Eliz. 346: an account of the proceedings is found in Moore, *op. cit.* 215.

[14] Exch. B. & A., Southton, Chas. I, 42, and Exch. Decrees, E., 17 Chas. II, f. 63 and 137.

[15] *State Papers*, dom. Car. I, cxxi, 21.

houses and wharves had been built by different persons outside the old or Thames wall, on the river, within the limits of the grant to Carlisle; in 1629 a new information was filed against Philpott and other tenants of the owners of these houses, alleging that the lands belonged to the Earl as grantee of the King in the exercise of the King's prerogative. The attorney general was careful not to submit the case to a trial at law. The case appears to have been heard at Trinity Term, 1629, and also at Michaelmas, 1631, when Walter, Chief Baron, a great and courageous judge, presided. His judgment was against the Crown, for he says

"That *prima facie* and of common right those who have land adjoining to the said river, or any river which ebbs and flows, shall have all the land to low water mark, and it shall be intended to belong to those who have the land upon each side." [16]

But this did not suit the King, and an order was made prohibiting Chief Baron Walter from sitting further in the case. Later, about 1631, after the death of Walter, the court having been reorganized with Davenport as Chief Baron, and Dedham, Trevor and Weston, Barons, the case came up and it was decreed that the tenants be removed. Even then, however, Chief Baron Davenport said:

"he would not take away the freehold of any man upon a certificate," [17]

thus despite the powerful pressure of the Crown, showing that he still had some respect for the rights of Englishmen. The decree indicates that the court was not even then agreed on the question of the prima facie right of the Crown. A commission issued under this decree and was served on the tenants. They refused possession and an injunction issued to remove them. This was served as to some and they in time attorned to the Crown; as to others, it was never served. The suit dragged along until 1640, when the revolution intervened and it was finally dropped. Meanwhile the owners of the property had sued the tenants (after their coercive attornment to the King) for the rent, not only in the Common Pleas but also in the Exchequer of Pleas. They were successful and the poor tenants, deserted by the King, were thrown out penniless and helpless, their appeals for relief availing them naught.

The petition to the King by his grantee, Carlisle, states among other things, even after the so-called decree in their favor, that

"your Majesty's title is not likely to prevail" owing to the common outcry, "and the rather because the Barons of your Majesty's Court of Exchequer have of late appeared very doubtful in their opinions, whether to determine for or against your Majesty in the question of the marshes, which your petitioners do conceive to proceed for want of the patronage of some special person of your Majesty's most honorable Privy Council

[16] Hargrave, *M. S.* No. 30, f. 266.
[17] *Ibid.*

to countenance the said matter; and doe suppose and hope that the doubtes of the Barons might be removed." [18]

There was still some hesitancy, even with the successful litigants, in regard to the expediency of a judgment which took away a man's property without right. The drama of the life of Charles unfolded; the Grand Remonstrance, in its 26th Article, evidently referred to the *Philpott* and other kindred cases, when it charged the King with

"the taking away of men's rights under colour of the King's title to land between high and low water marks."

The *Philpott* case has never been recognized as the law in England. It was once referred to, in 1671, in the case of *Whitaker* v. *Wise,*[19] but merely to say that it was there suggested, contrary to the decision in *Sir Henry Constable's Case,* that the foreshore is in the Crown only.

It is without any desire or intention of detracting from the just fame and reputation of Lord Hale that attention is called to the fact that his writing, now commonly known as *De Jure Maris,* was possibly the subject of more discussion and controversy than any other book ever written on a legal subject; that many of the ablest students of the common law in England have differed from some of his statements on fundamental questions; that for a long time it was even doubted that the work was written by him at all, the belief being held that some one had taken his name for the sake of the reputation it would give to an otherwise unknown writer. This latter belief time has disproved, and it has been demonstrated with reasonable certainty that the work is really that of Lord Hale. It still is true, however, that the mere statement of a writer, no matter how prominent, that the common law is thus or so, without giving authority for the statement, should be regarded with caution, and carefully considered before being accepted as the fact.

One of the most learned of common law students, and the author of a history of the common law which is a classic, Frederic William Maitland, in tracing the origin of the doctrine of the *jus privatum* in the Crown, after showing that it came into being during the reign of the Stuarts, says:

"That the Stuarts united against themselves three such men as Edward Coke, John Selden and William Prynne, is the measure of their folly and their failure. Words that, rightly or wrongly were ascribed to Bracton rang in Charles' ears when he was sent to the scaffold. Even pliant judges whose tenure of office depended on the King's will, were compelled to cite and discuss old precedents before they could give judgment for their masters; and even at their worst moments they would not openly break with medieval tradition, or declare in favor of that

[18] (1639) *State Papers,* dom. Car. I, cccciii, 152.
[19] Referred to in 2 Keble 759.

'modern public state' which has too often become the ideal of foreign publicists trained in Byzantine law." [20]

What the English judges think of precedents originating during the reign of the Stuarts, is frequently indicated in their decisions. A reference to one will suffice:

"I must say that I have not such veneration for precedents taken from the arbitrary reigns of these monarchs and I hope I shall not see such precedents revived in this reign; if they do take temporary root they will soon be eradicated." [21]

As already indicated, the common law of England as of April 19, 1775 was declared to form the law of the new state of New York, growing out of the Revolution. While the treatise of Lord Hale was written, as far as we have authentic information for our guide, about 1667, it did not see the light until some time after the Revolution—in 1786 or 1787—so that it could not have been in the minds of the framers of the constitution of New York in 1777.

About 1850, for the first time in the history of English law, the rule of prima facie title to the foreshore in the Crown was stated authoritatively in the case of *Attorney General* v. *London*.[22] The brief of Mr. Merewether, in that case, is probably the fullest and most authoritative exposition extant of the old and existing law on that subject; and he fully sustains what has been here said.[23]

This being the case it is apparent that the conclusion of our own courts on this subject was based on an error. Has the court corrected the error into which it fell in earlier days? No decision seems to have been made wherein the precise question as we have stated it here has been treated directly; but it seems that it has been considered, and very forcibly by our highest court. Of course it is well understood that when the constitution said that the common law became the law of the state it meant that it did so only so far as suitable to the conditions here; and that left it for the courts to say whether in a given case rules of

---

[20] *English Law*, 9 Encyclopedia Britannica 605.

[21] Wood, *B.*, in *Attorney General* v. *St. Aubyn* (1811) Wightwich 167, 187.

[22] (1845) 8 Beav. 270.

[23] Much more might be said on the same subject; but it would require more time and space than is here justifiable. Those who would pursue the subject further can find ample material for study in the books. The best of these is probably Moore, *op. cit.* That book was written largely at least to disprove the contention of Digges and the statement of Lord Hale on the point. The writer had at his command, what our own earlier judges lacked, the complete history of the adjudged cases at common law on the point. His conclusion is that not before 1844 at least was it the common law of England that title to such lands was in the Crown. Hall says in his work that such was not the law in 1830. *Rights of the Crown in the Sea-shore*, reprinted in Moore, *op. cit.* Even now, were the question carefully examined it would be found in the light of more recent decisions, that the rule of Great Britain is so surrounded with restrictions and safeguards of the rights of the upland owner that the crown has nothing more than a shadow of right in such lands. aside from its power to control commerce and navigation. And this power is now regulated with extreme care by statute.

the common law, even though existing beyond a doubt, applied to this country. There are numerous cases in which the rules of the English common law have been held inapplicable. In some jurisdictions it has been held that title to lands under navigable waters is vested in the adjacent owner. Generally, this being a question purely of local law, it is a rule that title is in the people of the respective states, either in trust or in the state as proprietor, subject of course, in all cases, to the paramount rights of commerce and navigation. All the states agree, however, that as to the waters themselves and the land so far as the public use of the waters is concerned, the rights of the public are supreme; and these rights the state holds in trust under a title in itself inalienable. In at least one instance it has been held by the courts of New York that the rule of the civil and not that of common law applied, though in a modified form, to land under a fresh water stream.[24]

Some of the decisions hold directly that in this state the title not only to the waters themselves but also to the soil is held by the people in trust, and that it is inalienable; others hold that there is a distinction between the two, the waters being held in trust for the purposes of commerce and navigation, while the land under the water is held by the people as proprietor. It seems, however, that if the cases to which we are about to refer are authority (and they have never been overruled or even criticised, so far as we are aware) the court has declared that the supposed common law as to the ownership by the Crown of such lands never became applicable here owing to different conditions making its application impracticable; and that the title to such lands is vested in the adjacent owner.

That was a rule well adapted to conditions in England but, as well suggested by the New York Court of Appeals in *Brookhaven* v. *Smith*,[25] it may not have been adapted to conditions in this country. In that case the Court after discussing the *Saunders* and *Rumsey* cases in connection with the rule of the common law as prevailing in England, at the time of the Revolution, and after a review of many of the cases, said:

"The interpretation, which, as I have shown, has been given by the courts of the state to the riparian owners' easement, or right of access, is justified in reason, is opposed to no statute and accords better with the circumstances, under which in this country, such rights are possessed. This broader view finds some justification in the peculiar nature of our political institutions. In our democratic form of government,

[24] This was a case regarding land under the Hudson and Mohawk rivers above the ebb of the tide, *People ex rel. Loomis* v. *Canal Appraisers, supra,* footnote 1, but even so, the civil law rule never obtained to its fullest extent even there or elsewhere in this state; for the title of the state in such lands, under these circumstances, was always confined to ordinary high water mark; whereas the rule of the civil law would have carried such title to the highest high water. Inst. L. 2, T-1, S. 3. And this strip of land would be subject in New York to the common law rights of the riparian owner.

[25] (1907) 188 N. Y. 74, 86, 80 N. E. 665.

the residuary sovereignty not granted to the departments and offices of the government is in the people of the state. The residuary ownership of all property held by the state is in the people of the state and may not the accustomed exercise by the property owners of some incidental rights with respect to it, as in the use of soil of navigable arms of the sea, or rivers, for the support of piers and docks, become a common right and, as it has been suggested before, the common law of the state? I think so."

It is true that in that case a dissenting opinion, on the right of a riparian owner to construct or maintain docks and wharves, was written by Judge Hiscock, in which Judges Werner and Vann concurred. In the later case of *Barnes* v. *Midland Term R. R. Co.*,[26] however, in which the opinion was by Judge Werner, and was concurred in by all of the judges, the rule in *Brookhaven* v. *Smith* was adopted to its fullest extent, as applied not only to riparian proprietors but to littoral proprietors as well; and this has become the settled law of the state.

It is interesting to quote from this opinion:

"Our recent decision in *Town of Brookhaven* v. *Smith* . . . very materially simplifies the question submitted to us in the case at bar. In that case it was definitely settled that in this state a riparian owner whose land is bounded by navigable water has the right of access thereto from the front of his land, and that such right includes the construction and maintenance of a pier on the land under the water beyond high-water mark, for his own use or for the use of the public, subject to general rules and regulations as Congress or the State legislature may prescribe for the protection of the rights of the public. . . . It is clearly pointed out in the *Brookhaven* case that the rigid rules of the common law of England relating to littoral and riparian rights are not adaptable in every particular to our political and geographical conditions; that in adopting the common law of the mother country we did not incorporate into our system of jurisprudence any principles which are essentially inconsonant with our circumstances or repugnant to the spirit of our institutions; that the *jus privatum* of the crown, by which the sovereign of England was deemed to be the absolute owner of the soil of the sea and of the navigable rivers, was totally inapplicable to the conditions of our colonies when the common law was adopted by them and that this right, from the first settlement of our province, seems to have been abandoned to the proprietors of the upland so as to have become a common right and thus the common law of the state."

That is clear, certainly clear enough to justify the deduction drawn by Judge Blackmar in the case to which reference will hereafter be made. While the court assumes, as many other times had been done without careful investigation, that the rule of the common law in England, at the time of the Revolution, was as stated, the error is not material, for the court at the same time holds directly that the "common

[26] (1908) 193 N. Y. 378, 383, 85 N. E. 1093.

law rule," is inapplicable to conditions in this country. In *Bardes* v. *Herman*,[27] Blackmar, *J.*, said:

"The Barnes case decides that the common law of England as to the ownership by the sovereign of the *jus privatum* never obtained in the province which became the State of New York; but that the *jus privatum, which I understand to be the complete title,* subject to the rights of the public, was abandoned to the owner of the upland. And this abandonment was the result of common usage so as to become a common right and thus the common law of the state."

In that case the grant made in 1817 to Cornelius Vanderbilt by the commissioners of the land office, of the land under water adjoining Staten Island, was under construction. The grant, as described, adjoined land of the appellant, and ran along low water mark, the land between high and low water mark, not being, in terms at least, included in the description. The question was as to the title thereto. Blackmar, *J.*, held as above indicated, that Vanderbilt, as upland owner, had title to the foreshore in accordance with the decision in the *Barnes* case. This decision was unanimously affirmed by the Appellate Division, Second Department.[28] Burr, *J.*, wrote the opinion but did not refer to *Barnes* v. *Midland Ter. R. R. Co.*, or to *Brookhaven* v. *Smith*, or to the opinion at Special Term. He seems rather to have placed his decision on either of two points,—that the grant to Vanderbilt might be so construed as to include the strand or shore, *i. e.*, the land between high and low water mark; or that, in any event, the state was bound by the action of the commissioners of the land office, and possibly long acquiescence, from now claiming the strip in question. This was affirmed in the Court of Appeals[29] on the opinion of Burr, *J.*

Judge Kelly, while sitting at Special Term, in *Somerville* v. *New York*,[30] followed *Bardes* v. *Herman*, but whether he adopted the declaration of Blackmar, *J.*, or that of the Appellate Division, is not clear.

In *Oelsner* v. *Nassau Light & Power Co.*,[31] which is also a decision of the Second Department, the opinion being by Miller, *J.*, it was suggested, referring to the interpretation by Blackmar, *J.*, in the *Bardes* case of the effect of the decisions in *Brookhaven* v. *Smith*, and *Barnes* v. *Midland Ter. R. R. Co.*, that the Court of Appeals did not intend to go so far as that. As Judge Miller points out, however, the adoption by that court, in the *Barnes* case, of the decision in *Brookhaven* v. *Smith*, settled the law in this state on the points there decided, notwithstanding the dissenting opinion in the earlier case, because the dissenting judges there expressly concurred in the *Barnes* decision.

---

[27] (1909) 62 Misc. 428, 431, 114 N. Y. Supp. 1098, (italics ours).
[28] (1911) 144 App. Div. 772, 129 N. Y. Supp. 723.
[29] (1913) 207 N. Y. 745, 101 N. E. 1094.
[30] (1915) 89 Misc. 188, 153 N. Y. Supp. 253.
[31] (1909) 134 App. Div. 281, 118 N. Y. Supp. 960.

Later cases like, for example, the *Steeplechase Park* case,[32] contain expressions which, it may be suggested, are at variance with the decisions just referred to; but in none of them, was that precise question at issue. The question in the *Steeplechase Park* case involved the effect of a grant of land under navigable water (in that case under the sea) to a riparian owner by the commissioners of the land office, the grant being without condition. The Court upheld the grant. But if the construction which has been suggested of the decisions in *Brookhaven* v. *Smith* and other cases along that line is correct, it is obvious that the grant considered in the *Steeplechase Park* case added nothing to what the riparian owner already possessed.

At any rate, no matter what may be the correct view on the point as to the line of decisions commencing with *Brookhaven* v. *Smith*, it is reasonably certain from all the decisions now entitled to be regarded as law that whether or not the upland owner is actually the "owner" of the adjacent soil under navigable water, he is the owner of everything else, subject, of course, to the burden or easement possessed by all the people of the nation to use the waters over the land for purposes of commerce and navigation and subject always to the paramount right, first, of the federal government, and after it, of the state, to make such use of the waters and the land under it as the necessities of commerce and navigation require. A riparian owner possesses as inherent in and a part of his upland and not as an appurtenant, all common law riparian rights. He has, as such upland owner, a right to build and maintain either a public or private wharf or pier; he has a right of access from his upland to the navigable waters; he has a right of boating, fishing and bathing; and, if a grant of the submerged lands be made, he has a preferential right to that as well. If it be assumed that in the interests of commerce or navigation the commissioners may refuse him a grant of the submerged land, he still retains, even as against a grant to another, if such a grant be made, all his common law riparian rights. These, as it has been frequently declared by our courts, are property, and as such are, essentially and as a matter of course, within the protection of both the federal and state constitutions. Possibly the legislature, notwithstanding the provisions of the public lands law, might intervene and might make a grant directly; but if it has that power, and if it should exercise it, and if in doing so it should make or undertake to make a grant to one other than the riparian owner, the common law riparian rights of the latter would remain wholly unaffected unless it were made in the due exercise of the power of eminent domain.

Thus it would seem, however viewed, that what the state has—if it possesses anything at all—is a mere shadow of a property right in lands so situated.

---

[32] *People* v. *Steeplechase Park Co.* (1916) 218 N. Y. 459, 113 N. E. 521.

It has seemed to the writer that this attempt to differentiate between the title to the soil under navigable waters, the paramount rights of the public in the waters and therefore in and over the soil itself, for the purposes of commerce, navigation, and fishing, and the riparian rights possessed by the adjacent upland owner in and over these waters, and therefore necessarily in and over the soil over which they flow, and the attempt to give the one to one party and the other to another party, is legally and economically unsound and, in fact, impossible in its practical operation.

The mere ownership of the soil unless united with the ownership of the common law riparian rights, is shadowy and chimerical. To such bare ownership, if it should exist in any given case, there could attach nothing in the way of property rights which would not be subordinate to and absorbed in the other and greater rights to which the soil is always subject. Why, then, try to separate the two? Why not adopt the rule, consistent with logic as well as morals, that the one goes with the other, and make them both, as they now are and always must remain, subject to the paramount right in the people and in the federal and state governments properly to regulate their use in the promotion of commerce and navigation? That would seem to be the simple, the sensible way out of the apparent difficulty into which a maze of decisions has led us. And, it is submitted, notwithstanding the chance expressions of some of the judges in later cases, that was just what was in the minds of the judges who participated in the decisions in *Brookhaven* v. *Smith* and *Barnes* v. *The Midland.* Judge Vann notices this inconsistency in his opinion in *Lewis Blue Point Oyster Co.* v. *Briggs,*[33] when he asks, after referring to Lord Hale:

"Is the grant of submerged soil, *which is so directly connected with the public right of navigation as to be incapable of complete separation therefrom,* subordinate thereto to the extent necessary to promote and develop commerce?"

The course indicated in the cases referred to was straight and plain; and one dictated by prudence, because of the valuable property rights involved. It is a case where the direction of Apollo to Phaethon should not apply, *"Medio tutissimus ibis";* a case where safety lies, not in the middle course, but in the extreme, in the higher and more serene atmosphere of logic and truth, which here seems to unite for the common good. The mighty Akbar once said, "I have never seen a man lost in a straight road."

As to the title to lands in this state in navigable streams not affected by the tides, it has been held that in the Hudson and Mohawk Rivers, for special reasons, the rules of the civil law apply and that in such

[33] (1910) 198 N. Y. 287, 292, 91 N. E. 846 (italics ours); affirmed with opinion in (1913) 229 U. S. 82, 33 Sup. Ct. 679.

streams, when navigable above the ebb and flow of the tide, the title is in the people.[34] As to such lands in other fresh water streams and lakes, the common law rules apply, and under them the title is in the adjacent owner, subject always to the paramount rights of commerce and navigation.[35]

The title to submerged lands in international boundary streams and in the Great Lakes is governed by the same rules of law as apply to land under waters affected by the ebb and flow of the tide.

The only other question to be considered, is the title to land in tidal non-navigable waters.

It has been said, more than once, and so often repeated in some quarters that those making the statement have to come to believe it, that by the rule of the common law all waters where the tide ebbed and flowed are to be treated as navigable. This also is taken from Lord Hale, upon whom, as in other cases, the responsibility for the rule is placed. He does say something that bears that construction; but when his work is considered as a whole it will be seen that he did not go that far. He was too good a master of the common law to make that statement without reservation.

"There be some streams or rivers, that are private not only in propriety or ownership, but also in use, as little streams and rivers that are not a common passage for the king's people. Again, there be other rivers, as well fresh as salt, that are of the common or publick use for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are *prima facie publici juris,* common highways for men or goods or both from one inland town to another." [36]

This and other expressions that might be quoted from that writer, indicate that he never intended to declare that all waters, where the tide ebbed and flowed, were navigable, whether so in fact or not. Lord Mansfield repudiated the doctrine, as have other learned masters of the common law:

"*Ex facto oritur jus.* How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so; for there are many places into which the tide flows that are not navigable rivers; and the place in question may be a creek in their own private estate." [37] So Chief Justice Shaw, in *Rowe* v. *Granite Bridge Corporation,*[38] a leading case, the logic of which is invincible, as usual with that eminent judge.

Mr. Houck in his work on rivers [39] says also:

---

[34] *Smith* v. *Rochester* (1883) 92 N. Y 463.
[35] *Fulton L., H. & P. Co.* v. *State* (1911) 200 N. Y. 400, 94 N. E. 199.
[36] *De Jure Maris, supra,* footnote 11, c. 3.
[37] *Mayor of Lynn* v. *Turner* (1774) 1 Cowp. 86.
[38] (Mass. 1838) 21 Pick. 344-7. See also Piersson, *The Dutch Grants, Harlem Patents and Tital Creeks* (1889) 46, 64-5, where the whole subject is considered with care and discrimination.
[39] Houck, *Law of Navigable Rivers* (1868) 18.

"Deprived of Lord Hale's name, the law, as laid down in the treatise referred to, in relation to rivers, would hardly ever have been recognized in this country. It was the name of the great jurist that dazzled our judges, and caused some of them to disregard the plainest principles of common reason."

From these observations the conclusion to which we are led is that the question is one of fact; is the water in question, in fact navigable? If not, then the soil so situated belongs to the adjoining owners *usque filum aquae.*

JOSEPH B. THOMPSON

WHITE PLAINS, N. Y.